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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 258

AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, et al.,

Appellants,

v.

FROZEN FOOD EXPRESS, et al.,

Appellees

APPELLANT RAILROADS' STATEMENT OF JURISDICTION

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IN THE

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OCTOBER TERM, 1956. No.

Akron, Canton and Youngstown Railroad Company, et al.,
Appellants,

v.

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Appellees.

APPELLANT RAILROADS' STATEMENT OF JURISDICTION.

In compliance with Rule 13, paragraph 2, of the Revised Rules of the Supreme Court of the United States, the Appellant Railroads, a list of which is attached and marked Appendix A, each of which was an intervening defendant below, most respectfully submit this their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order and judgment of the District Court of three judges entered in this cause.

OPINION AND JUDGMENT BELOW.

The opinion of the United States District Court for the Southern District of Texas, Houston Division, which Court consisted of the Honorable J. C. Hutcheson, Chief Circuit Judge; the Honorable Ben C. Connally, District Judge; and the Honorable T. N. Kennerly, District Judge,

is reported under the name *Frozen Food Express* v. *United States*, 148 F. Supp. 399 (S. D. Texas, 1956). The final judgment of that Court was entered on March 14, 1957, a copy of which is attached and marked Appendix B. It should be noted at this point that this appeal is from only a portion of the judgment. It should also be noted that this appeal involves, to some extent at least, litigation previously before this Court, and therefore it deemed appropriate to invite attention to the following reported cases, all directly concerned with the question here the subject of review:

Frozen Food Express v. *United States*, 128 F. Supp. 374 (S. D. Texas, 1955);

Frozen Food Express v. *United States*, 351 U. S. 40 (1956);

East Texas Lines v. *Frozen Food Express*, 351 U. S. 49 (1956).

JURISDICTION.

(1)

The proceeding below had its beginning in an action to enjoin and set aside certain orders of the Interstate Commerce Commission pursuant to the requirements of 5 U. S. C. § 1009, 28 U. S. C. § 1336, 1398, 2321-2325, inc., and 49 U. S. C. § 305 (g), brought by the Appellee Frozen Food Express. That cause was heard by a District Court of three judges in accordance with the requirements of 28 U. S. C. § 2325. The Court, after considering the matter, concluded that the order of the Commission was not reviewable and ordered the action dismissed. *Frozen Food Express* v. *United States*, 128 F. Supp. 374, 379 (S. D. Texas, 1955). These Appellants and others appealed the order dismissing the action to this Court and thereafter this Court held, contrary to the District Court, that the

Commission's order was reviewable and ordered the District Court to adjudicate the merits. *Frozen Food Express* v. *United States*, 351 U. S. 40, 45 (1956). The three judge District Court thereafter heard arguments addressed to the merits of the Commission's order, and on December 31, 1956, issued an opinion in which it sustained to some extent, and enjoined to other extent, the Commission's order which was the subject of review. *Frozen Food Express* v. *United States*, 148 F. Supp. 399 (S. D. Texas, 1956). The determinations of the Court below were made effective by a judgment entered March 14, 1957. It is from a portion of this judgment that the instant appeal is taken. A Notice of Appeal from this judgment was filed by these Appellants in the United States District Court for the Southern District of Texas, Houston Division, on May 11, 1957.

(2)

Jurisdiction of a direct appeal from a three judge district court in matters of the type here involved is vested in the Supreme Court by statute, 28 U. S. C. §§ 1253 and 2101 (b).

(3)

Such jurisdiction of the Supreme Court is also made plain by *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49 (1956).

THE QUESTION RAISED ON APPEAL.

Whether the three judge district Court below was in error in interpreting the decisions of the Supreme Court of the United States in the cases of *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49 (1956), and *Interstate Commerce Commission* v. *Home Transfer & Storage Co.*, 352 U. S. 884 (1956), and thereby holding that dried egg powder; dried egg yolks; milk, powdered; buttermilk; and fruits or vegetables (quick frozen) are "agricultural

commodities" as that term is used in Section 203 (b)(6) of the Interstate Commerce Act, 49 U. S. C. § 303 (b)(6), and, that therefore, these commodities may be moved over the highways in interstate commerce by motor carriers not holding a certificate or permit issued by the Commission?

STATEMENT OF THE CASE.

The matter now before this Court was first presented in a proceeding before the Interstate Commerce Commission, *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951). That proceeding involved an extremely important but very troublesome section of the Interstate Commerce Act, namely, Section 203 (b)(6), 49 U. S. C. § 303 (b)(6), which provides as follows:

> "Nothing in this part [*i.e.*, the provisions providing for economic regulation of the motor carrier industry] * * shall be construed to include * * motor vehicles used in carrying * * agricultural commodities (not including manufactured products thereof) * *."

Prior to the *Determination* case, and from the very inception of regulation of the interstate motor carrier industry in 1935, there had been considerable doubt and much confusion among those in the transportation industry as to where the line should be drawn in separating agricultural commodities that had been merely processed from those which had been manufactured, in determining whether such items had to be handled under regulation or could be transported over the highways outside of regulation. The language of the statute itself was not at all helpful in establishing this line, and the legislative history was little better. Left to their own devices, the carriers made such determinations largely upon the basis of what was individually thought beneficial without regard for the basic and over-all objectives of the statute and the regu-

latory scheme created by it. Attempts on the part of the Commission to classify particular items were on an isolated or fragmentary basis and, in the few instances where the courts became involved, the approach was substantially the same. Direction and a well defined course were entirely lacking and it is fair to say that the regulatory scheme was being seriously endangered by the flounderings that were taking place. It cannot be gainsaid that what was urgently needed was Commission action which would outline a pattern that could be easily followed and which would at the same time provide a sensible and workable solution so that the entire industry, within reasonable limits, would have clearly in mind what type of items were exempt and what type of items were required to be handled under regulation. Stated a little differently, what was needed was a Commission interpretation of the statute which would have every-day workability, as contrasted with legalistic and academic accuracy and precision.

In the *Determination* case it is apparent that the Commission's objective and purpose were to provide the transportation industry, shippers, and others vitally concerned with interstate commerce with just such an interpretation and application of the statute. A reading of the Commission's report will demonstrate that the method it followed was to review the legislative history of the section and the court decisions dealing with similar Congressional language. From this review it was concluded that the term "agricultural" ordinarily includes farming, horticulture, forestry, dairying, and live stock and poultry raising, and that the term when used in the Interstate Commerce Act should be given its ordinary meaning. Thus "agricultural commodities" as used in Section 203 (b)(6), the Commission said:

> "* * embraces all products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live

poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey)."[1]

Having found the scope of the commodities embraced within the term "agricultural commodities", the Commission next turned to the meaning of the term "(not including manufactured products thereof)" which is the statutory standard which determines whether the transportation is under regulation or outside of it. This term takes on importance when commodities, which in the first instance are admittedly agricultural commodities, are subjected to processing. In such situation the inquiry is whether the processing has converted the once agricultural commodity into a manufactured product. No deep or searching thinking is required to reach the conclusion that such an inquiry—with the myriad degrees of processing actually applied, or likely of application as new techniques are developed, to agricultural commodities—results in the finest shades of distinction and almost hopelessly confusing analogies. The line between merely processed and manufactured would seem to be as difficult to draw as the line between educated and uneducated.

Attempting to deal with this perplexing problem, the Commission looked to the decisions of this Court and concluded that an agricultural commodity becomes "manufactured" when, as a result "* * * of treating or processing, [it acquires] new forms, qualities, properties, or combinations",[2] and on the basis of this definition it then classified a number of processed agricultural commodities as either in the exempt classification of "agricultural commodities" or in the regulated classification of "manufactured products."[3]

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[1] *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 519 (1951).

[2] *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 521 (1951).

[3] *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 527-558 inc. (1951).

Frozen Food Express, a certificated motor carrier, handling some traffic of the type involved in the *Determination* case under regulation—but faced with competition from other motor carriers operating outside of regulation and handling as exempt particular commodities held by the Commission to be in the non-exempt category, under a claim that the Commission's interpretations were not proper—in order to test the legality of the Commission's classifications, brought suit in July of 1954 in the Southern District of Texas before the three judge Court below to enjoin the Commission from enforcing its order in the *Determination* case. These Appellant Railroads, the American Trucking Association Inc., and others in the transportation industry having an interest in preserving fair and equitable regulation intervened in support of the Commission's order. The Secretary of Agriculture and the Department of Justice also intervened but for the purpose of having the Commission's order set aside as it applied to particular processed items. After hearing argument and receiving briefs, the three judge Court concluded that the Commission's order was not reviewable and dismissed the suit. *Frozen Food Express* v. *United States*, 128 F. Supp. 374, 379 (S. D. Texas 1955).

In addition to seeking a review of the Commission's order in the *Determination* case, Frozen Food Express in the same proceeding asked the three judge Court to enjoin and set aside another order of the Interstate Commerce Commission which specifically directed Frozen Food Express to cease and desist from transporting fresh and frozen dressed poultry in interstate commerce until a certificate was secured.

The commodities embraced in the cease and desist order, namely fresh and frozen dressed poultry, had been placed in the manufactured category in the *Determination* case. The Court below granted the injunction. *Frozen Food Express* v. *United States*, 128 F. Supp. 374, 381

(S. D. Texas, 1955). These Appellant Railroads, the American Trucking Associations, Inc., interested certificated motor carriers, and the Commission appealed both orders of the three judge Court to this Court. Probable Jurisdiction was noted with respect to both orders of the lower Court. Thereafter this Court in separate opinions and orders, in one instance reversed and in the other instant affirmed the Court below. In *Frozen Food Express v. United States*, 351 U. S. 40 (1956), this Court with Mr. Justice Harlan dissenting, held that the Commission's order in the *Determination* case was reviewable and returned that case to the three judge Court below for review on the merits.

In *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49 (1956), this Court in a five to four decision affirmed the lower Court's holding that the Commission had erred in concluding that fresh and frozen dressed poultry was not an agricultural commodity. Mr. Justice Douglas in stating the views of the majority said at Page 54:

> "At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage, we cannot say that it has been 'manufactured' within the meaning of § 203 (b)(6)."

This language has given rise to much speculation within the transportation industry as to whether this Court has pronounced a new and different test from that adopted by the Commission for determining the point at which processing becomes manufacturing. Certainly in cases before three judge courts following the decision in the *East Texas Lines* case, there are strong indications that those courts have taken this language to prescribe a new test, one which is more liberal in favor of the exempt status than the Commission's.[4] The importance of this test will

[4] *See Consolidated Truck Service* v. *United States*, 144 F. Supp. 814, 817 (Dist. N. J. 1956); *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp. 599, 602 (W. D. Wash. 1956).

become evident after the proceedings in the Court below are examined.

After this Court had ordered the Commission's order in the *Determination* case to be reviewed on the merits, the case was again briefed and argued orally before the Court below. In both the briefs and the oral arguments, particular attention was given to the so-called "Continuing Substantial Identity Test" and its application to the many commodities, the status of which was before the Court.

The Court below in an opinion handed down on December 31, 1956, *Frozen Food Express* v. *United States*, 148 F. Supp. 399 (S. D. Texas, 1956), applying the continuing substantial identity test held the following commodities to be exempt (148 F. Supp. at page 402):

> "* * frozen whole eggs; dried egg powder, dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; redried tobacco leaves."

The Court then went on and found the following commodities to be non-exempt saying (148 F. Supp., at page 403):

> "For the reasons set forth in our opinion Frozen Food Express *v.* U. S., 128 F. Supp. 374, at page 379

et seq., we hold to be non-exempt the following: slaughtered cattle; fresh meat; meat products. We likewise hold non-exempt, under the evidence, which deals with commercial creamery products, as 'manufactured products' of agricultural commodities, the following: cottage cheese; cream cheese; butter; cottonseed meal; fruits and vegetables canned; milk condensed. Each of these products has acquired a new identity, with new properties, and is devoted to new and different uses than its original principal ingredient. As result of combination with other constituents, of treatment and processing by varied types of machinery and equipment, a new product has emerged. If the semanticist urges that a can of peaches or of condensed milk may not properly be described as a 'manufactured product', it may well be that these items illustrate the point at which processing merges with manufacturing."

The holdings of the Court below that frozen fruits d vegetables are agricultural commodities were inenced to a considerable extent by a decision of a three lge court in *Home Transfer & Storage Co.* v. *United ates*, 141 F. Supp. 599 (W. D. Wash. 1956) aff. with-t opinion; *Interstate Commerce Commission* v. *Home ansfer & Storage Co.*, 352 U. S. 884 (1956), which was nded down after the opinion of this Court in *East xas Lines* v. *United States*, 351 U. S. 49 (1956).

In the instant appeal, these Appellant Railroads a e king this Court to review the holdings of the Court low to the effect that dried egg powder; dried egg yolks; lk, powdered; buttermilk; and fruits or vegetables uick frozen) are agricultural commodities within the eaning of that term as used in Section 203 (b)(6) of e Interstate Commerce Act. Each of these commodities, e Commission in the *Determination* case had earlier ld was *not* an agricultural commodity. The other hold-

ings of the Court below, regardless of whether they are in accord with those of the Commission in the *Determination* case, are not disputed before this Court by these Appellants.

The notice of appeal instituting this appeal was filed with the District Court below on May 11, 1957.

THE SUBSTANTIALITY OF THE QUESTION.

The agricultural production of this nation for the year 1954 furnished gross farm income of almost 34 billion dollars[5] and was a principal source of traffic for all forms of for-hire carriage. For the Class I Railroads which are parties in this litigation during this same year this tremendous agricultural production furnished freight revenues in excess of 1.4 billion dollars, or approximately 17.7 percent of their total freight revenues.[6] Thus, it can be seen that the transportation of agricultural production, whether unprocessed, processed, or manufactured is a commercial undertaking of gigantic size and of the greatest importance not only to the carriers, but to the shippers and consignees as well. And what is most important from the standpoint of the instant litigation is the growing trend on the part of the consumers to prefer agricultural items that have been extensively processed.[7] Since the consumers are evidencing a growing preference for processed agricultural items, it follows that the amount of such items that enter the stream of commerce is rapidly increasing. So, in this litigation, the concern is not only with traffic that is presently valuable to these Appellants, but also with traffic that in the future should be of increasing importance to them:

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[5] Agricultural Statistics, U. S. Dept. of Agriculture, 1955, p. 426.

[6] Transport Statistics for 1954—Interstate Commerce Commission, p. 41.

[7] Agricultural Statistics, U. S. Dept. of Agriculture, 1955, pp. 497, 250, 253.

The transportation by railroad of agricultural production regardless of whether such production is fresh, processed, or manufactured is subject to complete regulation, whereas the transportation of this segment of traffic by the railroads' competitors is free of all economic regulation unless the agricultural production is "manufactured". Since the railroads have had excessive difficulty in successfully competing for traffic which the motor carriers can handle outside of regulation, the interest of these Appellants in this litigation becomes clear. And particularly is this so when it appears that the determinations made by the Court below may have the effect of creating an exempt status for items of commerce which have long been regarded as properly moving over the highways only by regulated carriers. In summary, the question here involved is a most substantial one for if the decision of the Court below remains effective, the result will be to free from regulation for movement over the highways an important segment of traffic which until now has been regarded as traffic of the regulated carriers, and which when moved by railroads will remain under regulation. While it is true that to some extent this is an inequity inherent in the legislation, nevertheless, it is certainly a substantial matter if this inequity is improperly broadened by court determinations which are excessively generous in favoring the exempt status for commodities which have undergone considerable processing. It is respectfully submitted that with regard to the commodities here involved, namely, dried egg powder; dried egg yolks; milk, powdered; buttermilk; and fruits or vegetables (quick frozen), the decision of the Court below has extended the exemption far beyond what was contemplated by Congress largely because of a misunderstanding of the purport of the language of this Court in the *East Texas Lines* case.

This misunderstanding, these Appellant Railroads think, stems from a belief that this Court in utilizing the

continuing substantial identity test for determining the line between merely processed and "manufactured" was establishing a different and more liberal test in favor of exemption than the Commission adopted. The test the Commission used was that laid down by this Court in *Fruit Growers, Inc.* v. *Brogdex Co.*, 283 U. S. 1 (1931). There, Mr. Justice McReynolds relying on the definition in the Century Dictionary (283 U. S. 1, 11), held that manufacture exists where natural products by processing are given "new forms, qualities, properties, or combinations * *". In reaching this conclusion, this Court in the *Fruit Growers* case relied heavily upon its earlier language in *Hartranft* v. *Wiegmann*, 121 U. S. 609, 615 (1887), and *Anheuser-Busch Assn.* v. *United States*, 207 U. S. 556, 562 (1908).

That the continuing substantial identity test lately enunciated in the *East Texas Lines* case is a restatement of the same test announced in the *Fruit Growers* case is not only evident from comparison of the language used, the latter test being the corollary of the earlier one, but also from the fact that both were founded upon the earlier statements of this Court in the *Hartranft* and *Anheuser-Busch* cases. If this analysis is correct—and logic and reasoning strongly indicates that it is—the question in the Court below was not whether under a new test the involved commodities are manufactured, but rather whether the Commission with respect to the particular items here before this Court reached the proper conclusions by the application of the test it used.

The difficulty and uncertainty that must necessarily exist in applying any test to determine the fine line between merely processed and "manufactured" commodities is compounded and magnified out of all proportion when there is confusion and doubt as to the test that should be applied. If the transportation industry, particularly the regulated segments thereof, is to expand and improve its facilities for handling processed agricultural items which

ill necessitate vast expenditures of capital, there must be certainty within reasonable limits as to the test to be applied to determine whether a particular item moves under regulation or outside of it. Experience has demonstrated beyond all doubt that when it becomes established that a particular processed item once believed to be the subject of regulation is definitely placed in the exempt category, the transportation of such item in large measure is diverted from the regulated carriers. This being so, if uncertainty exists about the status of particular items, wise business judgment demands that the regulated carriers not waste their capital and energies in purchasing new equipment and developing new techniques for transporting a type of traffic that within the immediate future may be lost to them. Perhaps in an ideal business climate, it would be otherwise, but realistically, the state of affairs is precisely as here expressed. The result of this is that shippers and the nation as a whole must be satisfied with a transportation service which falls short of what it could be if reasonable certainty existed. Particularly is this so with respect to the transportation of frozen fruits and vegetables.

Since the decision of this Court in the *East Texas Lines* case, Section 203 (b)(6) of the Interstate Commerce Act has been the subject of litigation in four different three judge federal courts. In three of these cases, the issue involved the establishment of the line between processed and manufactured. *Frozen Food Express* v. *United States*, 148 F. Supp. 599 (S. D. Texas, 1956); *Consolidated Truck Service* v. *United States*, 144 F. Supp. 814 (Dist. N. J., 1956); *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp. 599 (W. D. Wash., 1956), aff. without opinion, sub nom. *Interstate Commerce Commission* v. *Home Transfer & Storage Co.*, 352 U. S. 884 (1956). In the fourth case, this issue was not involved, the question being whether a substance found in the sub soil, namely peat moss is an agricultural commodity. *Premier Peat*

Moss Corp. v. United States, 147 F. Supp. 169 (S. D. N. Y., 1956).[8]

In each of the cases where the question involved manufacture, the courts applied the continuing substantial identity test to determine whether the particular commodities were manufactured, totally without regard to whether the Commission's conclusions based on the application of the test utilized by it were sound and correct. And from the language of the Court below, it appears quite evident that the Court believed that the continuing substantial identity test is a new, and inferentially a different, one. For example, the Court below refers to this test as "this most recent test" (148 F. Supp. 399, 402) indicating that it supersedes earlier versions. The disturbing and confusing impact of this is accentuated by the fact that the Court below in strong language concludes that the new test requires a liberal interpretation of the exemption. Thus, the Court below says:

> "In holding frozen fruits and vegetables to be exempt, the Home Transfer case has gone far toward settling the entire controversy in favor of the liberal interpretation of the exemption urged by the farming interests, the Department of Agriculture, and those motor carriers (as the Plaintiff) who seek to avoid ICC control in the carriage of these commodities."[9]

There is nothing in the opinion of this Court in the *East Texas Lines* case to support the conclusion that the continuing substantial identity test is either a new or a more liberal one in favor of exemption than that used by the Commission. At most, the *East Texas Lines* case stands for the proposition that this Court was convinced that the Commission had erred in concluding that by the application of the test it used, fresh and frozen dressed

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[8] This case is on appeal to the Supreme Court, *Baltimore & Ohio R. Co. v. Premier Peat Moss Corp.*, No. 1042, October Term, 1956.

[9] 148 F. Supp., 399, 402.

poultry were manufactured. The language of this Court establishes this. At page 54; Mr. Justice Douglas said:

> "The Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity in the industry which it regulates * *. But Congress has placed limits on its statutory powers; and our duty on judicial review is to determine those limits. * * Those limits would be passed here if the Commission were permitted to expand 'manufactured' to include such incidental processing as is involved in dressing and freezing a chicken."

This Court in the *East Texas Lines* case was not condemning the entire course of the Commission's reasoning which is so fully spelled out in the *Determination* case, but rather, it would appear, expressing the view that on the difficult question of the status of the particular border line commodities, namely fresh and frozen dressed poultry, the Commission had reached the wrong result. The five to four decision of this Court is an indication of this.

The Court below taking the language of this Court to create a new and more liberal test has not only completely disregarded the Commission's solution to the problem with respect to the particular items before this Court, but has also reached conclusions completely beyond the limits reasonably outlined by the *East Texas Lines* case.

In the proceedings leading to the Commission's order in the *Determination* case, a large number of scientists and others having broad knowledge of agriculture and the processing of agricultural commodities testified, as did representatives of many transportation companies. Others who did not testify submitted pleadings presenting their views, and there were unlimited opportunities for anyone to do likewise. Throughout the proceedings no one contended that any of the commodities here involved were in

the exempt category. All were in agreement that they are manufactured,[10] and the Commission by applying the test that manufacture exists where the items when processed take on new forms, properties or combinations, so concluded. It would seem applying the restated version of the test, namely that the exempt status is retained so long as continuing substantial identity remains, would also compel the conclusion that each of the items here involved is manufactured. Certainly, dried egg powder, dried egg yolks, powdered milk, buttermilk, through extensive processing have become as different from the products from which they are derived as any admittedly manufactured products are. If there is any doubt of this, it could be resolved by asking any of the millions of American soldiers and sailors who were subjected to powdered eggs and powdered milk during the last World War whether there is any similarity between those products and fresh eggs and milk. Were a restaurant to offer any of these items as a product having substantially the same identity as those from which they are derived, a customer's complaint of fraud would be more than justified and the restaurant's loss of patronage for deceit inevitable. If powdered milk and eggs are not manufactured, it tests imagination beyond limit to conceive of a manufactured food product.

Frozen fruits and vegetables are likewise something different from fresh fruits and vegetables. As the Commission stated (52 M. C. C. 511, 534):

> "Although no one questions the examiner's conclusion that frozen or quick-frozen fruits and vegetables are manufactured products, in view of certain

[10] See *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 534, 547, 550 (1951). It is to be noted that while none of the parties contended that frozen fruits and vegetables were not manufactured, that Commissioner Lee alone was of the view that such frozen items were in the exempt category unless "substantially changed in character and appearance." 52 M. C. C. 511, 562.

questions raised respecting other frozen commodities, some discussion of these items will be helpful. The quick freezing of fruits involves the addition of other ingredients, principally sugar or sirup. Since a 'combination' results, it follows in light of the foregoing definition of 'manufacture' that quick-frozen fruits are manufactured products. In the quick freezing of vegetables, the commodities are customarily blanched or scalded prior to freezing, and sometimes ascorbic acid is added, thus enabling the product to be held in that condition until ready for use. In the circumstances, the frozen vegetables cannot be said to be in their natural state. We conclude that they, too, are manufactured products."

Frozen fruits and vegetables are as different from fresh as canned fruits and vegetables are, as everyone knows. But as to canned fruits and vegetables, the Court below said (148 F. Supp. 399, 403):

"We likewise hold non-exempt * * fruits and vegetables canned; milk condensed. Each of these products has acquired a new identity, with new properties, and is devoted to new and different uses than its original principal ingredient. As result of combination with other constituents, of treatment and processing by varied types of machinery and equipment, a new product has emerged. If the semanticist urges that a can of peaches or of condensed milk may not properly be described as a 'manufactured product', it may well be that these items illustrate the point at which processing merges with manufacturing."

Essentially, both frozen fruits and vegetables and canned fruits and vegetables are preserved manufactured food products which result from agricultural commodities

having been: subjected to heat treatment; shelled, pitted or pared; divided or reduced in size; mixed with chemicals including salt, sugar, etc., and finally packaged and sold as different articles. Everyone would feel deceived and cheated if he were offered frozen strawberries or peaches as fresh, and equally so if offered frozen potatoes or luna beans as fresh. He would be just as indignant with such a substitution as he would be with canned fruits or vegetables for fresh.

The conclusion of the Court below that frozen fruits and vegetables are not manufactured—unlike its holding respecting buttermilk, powdered milk and powdered eggs—was not rested solely upon its application of the "new" continuing substantial identity test, for such conclusion was in accord with the opinion of the three judge court in *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp., 599 (W. D. Wash. 1956). But the decision there also was based on the feeling that the *East Texas Lines* case created a new test.[11]

It is the belief of these Appellant Railroads that the extremely liberal interpretations of the exemption contained in Section 203 (b)(6) of the Interstate Commerce Act that have resulted in such holdings as are here presented, namely that powdered eggs, powdered milk and frozen fruits and vegetables are not substantially different items than fresh eggs, milk, fruits and vegetables by reason of manufacture, indicate the urgent need for this Court to review the entire matter. Unless this is done, the path of liberal interpretation in favor of exemption will become so broad that it will destroy fair and sensible regulation of the motor carrier industry.

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[11] Some point may be made that the decision in the *Home Transfer* case was affirmed by this Court in *Interstate Commerce Commission* v. *Home Transfer & Storage Co.*, 352 U. S. 884 (1956). While this may be technically true, such affirmance was without opinion and upon presentations made only in jurisdictional statements. The affirmance under such circumstances is, of course, regarded as no different from the denial of certiorari in a non-appeal case.

What is needed is a reconsideration of the test laid down in the *East Texas Lines* case in the light of the pattern of decisions of the lower courts applying it to determine whether the test ought to be redefined, or more definite directions given for its application. If this is not done, the erosion of regulation will continue until the line between agricultural commodities and manufactured products thereof will be totally obliterated. If this be the inevitable result of the trend of the lower courts' decisions based on the *East Texas Lines* case, and this Court does not deem it appropriate to divert the flow in this direction, then the regulated transportation industry is entitled to know this so that its future plans and policies can be plotted and mapped. Similarly, if this Court has envisioned the trend of decisions as otherwise developing, this too is of vital concern to the regulated transportation industry, for then future plans can be drawn on the basis of reasonable certainty in this field. In either event, until this Court reviews the matter, the present state of affairs is unsatisfactory not only to those providing for-hire interstate transportation, but also to those in the nation dependent upon such transportation for marketing the products of their labor.

CONCLUSION.

The specific question here is whether the Court below was right in holding that dried egg powder; dried egg yolks; milk, powdered; buttermilk; and fruits and vegetables (quick frozen) are agricultural commodities as that term is used in Section 203 (b)(6) of the Interstate Commerce Act. But while the question as thus posed would seem to be a fairly limited one, its ramifications are most extensive and important, for involved in this question is the test to be used, and its method to being applied,

in determining where the line should be drawn in classifying an almost limitless number of processed agricultural items as either "agricultural commodities" and thus permitted to be handled by interstate motor carriers outside of regulation, or "manufactured" products and thus permitted to be transported only by motor common carriers having certificates or permits issued by the Interstate Commerce Commission. From a long range standpoint, the question before this Court is, because of its extensive ramifications, of the greatest importance to the entire regulated transportation industry for the answer to it will determine the amount of capital and efforts which will be expended to improve and develop new transportation facilities for the movement of the Nation's agricultural production. This, of course, is not only a concern of the regulated transportation industry, but as well of the vast segment of the public dependent upon such industry for moving the products of its labors in interstate commerce. It is therefore respectfully submitted that the question here is a most substantial one.

Respectfully submitted,

CARL HELMETAG, JR.,
JAMES W. NISBET,
CHARLES P. REYNOLDS,
Counsel for Appellant Railroads.

CERTIFICATE OF SERVICE.

I, Carl Helmetag, Jr., attorney for the Appellant Railroads herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Statement of Jurisdiction on the several parties to this action as follows:

1. On the Appellee, Frozen Food Express, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, Carl L. Phinney, Esq., and Leroy Hallman, Esq., First National Bank Building, Dallas, Texas;

2. On the Secretary of Agriculture, by mailing copies in a duly addressed envelope, with postage prepaid, to his attorney of record, Charles W. Bucy, Esq., Office of the Solicitor, United States Department of Agriculture, Washington 25, D. C.;

3. On the United States of America, by mailing copies in duly addressed envelopes, with postage prepaid, to its attorneys, the Honorable Herbert Brownell, Attorney General; and James E. Kilday, Esq., and Charles S. Sullivan, Jr., Esq., United States Department of Justice, Washington 25, D. C.; by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney of record, Malcolm R. Wilkey, Esq., United States Attorney, Houston, Texas; and by mailing a copy in a duly addressed envelope, with postage prepaid, to the Honorable J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C.

4. On the Interstate Commerce Commission by mailing copies in a duly addressed envelope, with postage prepaid to the Honorable Robert W. Ginnane, General Counsel, Washington, D. C.

5. On the several other parties by mailing copies in duly addressed envelopes, with postage prepaid, to their respective attorneys of record, to wit: David G. Macdonald, Esq., and Francis W. McInerny, Esq., Commonwealth Building, 1625 K St., N.W., Washington 6, D. C.; Peter T. Beardsley, Esq., and Fritz Kahn, Esq., c/o American Trucking Associations, Inc., 1424 Sixteenth Street, N.W., Washington 6, D. C.; Dale C. Dillon, Esq., and Clarence D. Todd, Esq., 944 Washington Building, Washington 5, D. C.; and by mailing copies in duly addressed envelopes, with air mail postage prepaid to Rollo E. Kidwell, Esq., 301 Empire Bank Building, Dallas, Texas; and Lee Reeder, Esq., 1012 Baltimore Avenue, Kansas City 5, Missouri.

Dated, this the 10th day of July, 1957.

Carl Helmetag, Jr.

APPENDIX "A."

LIST OF APPELLANT RAILROADS.

The below listed Railroads are the individual carriers which, together, comprise the Appellant Railroads. When used, the terms "Appellant Railroads" or "Railroads" include each of these named Railroads:

Akron, Canton and Youngstown Railroad Company
The Ann Arbor Railroad Company
The Atchison, Topeka & Santa Fe Railway Company
Atlantic Coast Line Railroad Company
The Baltimore & Ohio Railroad Company
Bangor and Aroostook Railroad Company
Boston and Maine Railroad
Central of Georgia Railway Company
The Central Railroad Company of New Jersey
Chicago & Illinois Midland Railway Company
Chicago and Northwestern Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago, Great Western Railway Company
Chicago, Indianapolis and Louisville Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Delaware and Hudson Railroad
The Delaware, Lackawanna and Western Railroad Company
The Denver and Rio Grande Western Railroad Company
The Detroit and Toledo Shore Line Railroad Company
Detroit, Toledo and Ironton Railroad Company
Duluth, South Shore and Atlantic Railway Company
Elgin, Joliet and Eastern Railway Company
Erie Railroad
Florida East Coast Railway Company
Fort Dodge, Des Moine & Southern Railway Company
Grand Trunk Railway System
Great Northern Railway Company

Green Bay & Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
The Kansas City Southern Railway Company
Lehigh and New England Railroad Company
Lehigh Valley Railroad Company
Maine Central Railroad Company
Midland Valley Railroad Company
The Minneapolis & St. Louis Railway Company
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
The Nashville, Chattanooga & St. Louis Railway
New York Central System
The New York, Chicago & St. Louis Railroad Company
The New York, New Haven & Hartford Railroad Company
New York, Susquehanna and Western Railroad Company
Norfolk and Western Railway
Northern Pacific Railway Company
The Pennsylvania Railroad Company
The Pittsburgh and West Virginia Railway Company
Reading Company
St. Louis-San Francisco Railway Company
St. Louis Southern Railway Company
Seaboard Air Line Railroad Company
Southern Railway Company
Southern Pacific Company
The Texas and Pacific Railway Company
Toledo, Peoria & Western Railroad
Union Pacific Railroad Company
Th Virginian Railway Company
Wabash Railroad Company
Western Maryland Railway
The Western Pacific Railroad Company

APPENDIX "B"

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

Civil Action No. 8285

Frozen Food Express,

v.

United States of America and Interstate Commerce Commission

FINAL JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on the 13th day of September 1956, before a duly constituted Three-Judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence and the briefs and argument of counsel for the respective parties, and being fully advised in the premises; and having on the 31st day of December, 1956, filed herein its opinion, containing its findings of fact and conclusions of law; now, in accordance with the said opinion, findings and conclusions, it is hereby

ORDERED, ADJUDGED, and DECREED as follows:

(1) The decision and order of the Interstate Commerce Commission entered April 13, 1951, in a proceeding docketed by the Commission as No. MC-C-968, *Determination of Exempted Agricultural Commodities*, is enjoined, suspended, annulled, vacated and set aside insofar as the

Commission found and concluded that frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables, washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; and redried tobacco leaves are not agricultural commodities within the meaning of Section 203(b) (6) of the Interstate Commerce Act [49 U. S. C. 303(b) (6)]; and

(2) All other relief sought by the plaintiffs herein, including the Secretary of Agriculture as Intervening Plaintiff, be and the same is hereby denied.

This the 14th day of March, 1957.

J. C. Hutcheson,
Chief Judge, United States Court of Appeals for the Fifth Circuit.

Ben C. Connally,
United States District Judge.

T. N. Kennerly,
United States District Judge.